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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPER W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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52 pp

QUESTION PRESENTED

Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a "yarmulke"—an unobtrusive skullcap which is part of his religious observance —while he is in uniform on duty at a military hospital.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-20a, *infra*) is reported at 734 F.2d 1531. The opinion of the district court (Pet. App. C, pp. 28a-34a, *infra*) is reported at 530 F. Supp. 12.

JURISDICTION

The decision of the court of appeals was issued on May 8, 1984. On August 10, 1984, the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. B, pp. 21a-27a, *infra*). On November 1, 1984, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. D, p. 37a, *infra*). On December 3, 1984, Chief Justice

Burger further extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985 (Pet. App. E, p. 38a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATEMENT

Petitioner is an Orthodox Jew who received rabbinical training and was ordained as a rabbi in 1970 (J.A. 189).[1] He served for two years as a chaplain in the United States Navy, and thereafter decided to study clinical psychology (J.A. 191-92). He enrolled in the Armed Forces Health Professions Scholarship Program and took courses in clinical psychology at Loyola University of Chicago. In September 1979, after graduating with a Ph.D. in psychology, petitioner entered on active duty with the Air Force, as a clinical psychologist, at March Air Force Base in California (J.A. 193-95).

From the time of his initial Air Force enrollment until early 1981—when he testified as a defense witness in a formal court-martial—petitioner kept his head covered, as is traditional among Orthodox Jews,[2] at all times, including the hours when he was on duty at the Air Force hospital (J.A. 181, 198-203). When he was out of doors, petitioner wore the regulation Air Force cap. When indoors, where the wearing of the cap is prohibited by Air Force regulations (AFR 35-10 § 1-6(h)(2)(f)), he wore a "yarmulke"—a dark-colored skull-cap measuring approximately 5½ inches in diameter (J.A. 250).

During this entire period of more than three-and-one-half years, petitioner received consistently outstanding performance ratings for his military service (J.A. 225-26, 256-67). No complaints concerning his yarmulke were received. Nor was

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[1] "J.A." denotes the Joint Appendix filed in the court of appeals.

[2] The *bona fides* of petitioner's religious beliefs and the fact that it is part of Orthodox Jewish practice for males to wear a head covering at all times were admitted by the government in the district court. Specifically, the Air Force admitted that "[i]t is a well-established tradition and practice among adherents to Orthodox Judaism that males keep their heads covered at all times" (J.A. 180).

there any other suggestion that his variance from Air Force dress regulations had any harmful effect on his execution of his duties or on anyone else's performance (J.A. 226-27).

In April 1981 petitioner testified as a witness for the defense in a court-martial while wearing his yarmulke. Adverse counsel then made a complaint against him to the hospital commandant (J.A. 23). On May 8, 1981, petitioner was told by the commandant that by wearing a yarmulke while on duty he violated the Air Force Dress Code, AFR 35-10, and that he would no longer be permitted to commit this violation outside the hospital (J.A. 24). Less than two months later—after there had been discussion between an attorney representing petitioner and the Office of the Air Force General Counsel—the commandant revised his order to prohibit petitioner from wearing a yarmulke anywhere, including the hospital (J.A. 25-26). On the following day, petitioner was given a formal letter of reprimand and threatened with additional sanctions, including a court-martial, if he did not cease wearing his yarmulke while in uniform (J.A. 183).

Petitioner promptly instituted this action for injunctive relief and damages. The district court entered a temporary restraining order and, after a hearing that was consolidated with a trial on the merits, issued an injunction sustaining petitioner's constitutional right to keep his head covered notwithstanding the Air Force regulation (pp. 35a-36a, *infra*). Acknowledging that military discipline "may render permissible within the military that which would be constitutionally impermissible outside it," the district court noted that "deference does not mean abdication" (p. 33a, *infra*). Having heard the testimony of expert witnesses and such explanation as the Air Force gave for its refusal to grant an exemption from its dress code for petitioner's religiously motivated wearing of a yarmulke, the district court concluded that no "reasoned and deliberate" analysis supported the Air Force's prohibition (p. 33a, *infra*). The district court enjoined the defendants from applying AFR 35-10 to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons," ordered the expungement from petitioner's military records of all negative references relating to his wearing of a yarmulke,

and awarded damages for pay lost as a result of the commandant's illegal order (pp. 35a-36a, *infra*).[3]

The court of appeals reversed. It held that the constitutionality of the Air Force's action was to be judged not by the standard of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), but by the standard of *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), because the case "does involve a clash between constitutionally guaranteed individual rights and constitutionally authorized military power" (p. 15a, *infra*). The court said that no balancing of governmental and individual interests was required, but that the constitutional inquiry was "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (p. 11a, *infra*). Although the court found various of the Air Force's justifications for barring a yarmulke in a military hospital "unpersuasive" (p. 16a, *infra*) or "weak" (p. 17a, *infra*), and acknowledged that petitioner's responsive arguments had "some force" (*id.*), the court concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (p. 19a, *infra*). The court held that although the dress regulations are "necessarily arbitrary," they may be enforced "not for the sake of the regulations themselves, but for the sake of enforcement" (*id*).

Three Circuit Judges dissented from the denial of a petition for rehearing. Circuit Judge Starr said that notwithstanding the deference due the military in matters relating to military affairs, the panel's decision "abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel" (p. 23a, *infra*). He characterized the Air Force's treatment of petitioner as "patently unconscionable," noting that neither expert testimony nor common sense justified

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[3] Petitioner had applied for an extension of his active duty with the Air Force prior to the events of May 1981. Although the commandant initially recommended that his application be granted, he withdrew that recommendation once the issue over petitioner's yarmulke arose (J.A. 219-20). Petitioner's application was then denied. Another action has been filed for damages resulting from this denial. *Goldman* v. *Secretary of Defense*, D.D.C. No. 81-3197. That action is awaiting the final outcome of this case.

the conclusion that other servicemen would resent a dress code exception for sincere religious beliefs (pp. 25a-26a, *infra*). Circuit Judges Ginsburg and Scalia agreed with Judge Starr's dissent on the ground that the First Amendment required accommodation to petitioner's spiritual needs (p. 27a, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals has sanctioned a direct governmental restraint on a serviceman's free exercise of his religion for no reason other than "the Air Force's interest in uniformity." That judgment conflicts not only with the doctrine repeatedly applied by this Court to protect observances by religious minorities from actions taken by civilian authorities, but also with this Court's warnings that judicial deference to military authority should not, in the area of constitutional rights, turn into abdication of independent judicial responsibility. This case is unlike any Religion Clause case now on the Court's docket because it concerns the Free Exercise rights of military personnel. Having granted certiorari in cases involving even indirect inhibitions on religious practices growing out of substantial governmental interests, this Court should also decide whether the military services may impose direct prohibitions on religious observances if their only justification is "enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement."

1. The decision of the court of appeals conflicts with this Court's consistent articulation of the constitutional standards for governmental restrictions on religiously motivated observances. The Court said in *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981):

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), this Court observed that it was "the essence of all that has been said and written" on the subject of the Free Exercise Clause

> that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

And in *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), the Court rejected the proposition that a "showing merely of a rational relationship to some colorable state interest" justifies an infringement on a Free Exercise right. The Court said that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"

Although this Court has frequently noted that greater deference must be given by the judiciary to legislative judgments affecting military affairs than to laws affecting only civilian interests, that doctrine has not been applied to override fundamental constitutional rights. Indeed, in *Brown* v. *Glines*, 444 U.S. 348, 353-58 (1980), the Court sustained Air Force regulations that affected free expression only after concluding that the regulations "protect a substantial Government interest" (444 U.S. at 354), and that they "restrict speech no more than is reasonably necessary to protect the substantial governmental interest" (444 U.S. at 355). If the approach of the court below—*i.e.*, that enforcement "for the sake of enforcement" is constitutionally sufficient in the military context—were valid, it would have substantially simplified this Court's task in *Brown* v. *Glines*.

As recently as *Chappell* v. *Wallace*, 103 S.Ct. 2362, 2367 (1983), this Court, speaking unanimously through Chief Justice Burger, reaffirmed the observation of former Chief Justice Warren that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." See also *Anderson* v. *Laird*, 466 F.2d 283, 296 (D.C. Cir. 1972) ("manifest restraints on the free exercise of religion can be saved from unconstitutionality only if they were enacted to serve paramount and compelling state interests, and if there are no alternative means to achieving the government's goal"); *Crawford* v. *Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) ("a succession of cases . . . has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications").

The unreasoned prohibition of petitioner's innocuous religious observance—which had caused not the slightest disruption of performance or morale during the previous three-

and-one-half years—was a blatant deprivation of his most basic right. It was ironic, as Judge Starr noted in dissent below, that the military—the institution that has "valiantly defended" our citizens' individual liberties "in the two centuries of the Nation's history"—now seeks to override religious liberty merely to secure uniformity and compliance.

2. This Court has granted certiorari in a number of Religion Clause cases this Term to consider the rights of religious observers under the Constitution's protection for the free exercise of religion. *E.g., Jensen* v. *Quaring*, No. 83-1944; *Alamo Foundation* v. *Donovan*, No. 83-1935. In both these cases the effect on religious observance of the governmental regulation is only indirect. In *Jensen* v. *Quaring*, observance of a conscientious belief results in the denial of a driver's license, and in *Alamo Foundation* v. *Donovan* no religious observance is affected. In the present circumstances, petitioner (like any other serviceman similarly situated [4]) is directly denied the right to engage in a religious observance so long as he is in the military service. Moreover, in each of the cases now on the Court's docket, there is an articulable governmental interest in the requirement imposed by law—a photograph is a desirable means of identification on a driver's license and a standard minimum wage for personal services has obvious social benefits. In the present case, there is no rational basis for the Air Force's restriction other than enforcement "for the sake of enforcement."

By the same token, arguments based on the policies of the Free Exercise Clause have been made in other cases on the Court's docket. *See, e.g., Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158; *Wallace* v. *Jaffree*, Nos. 83-812 and 83-929; *Aguillar* v. *Felton*, Nos. 84-237 and 84-238. The Free Exercise claim made in this case is substantially more compelling than the analogous claims presented in the cases now on the Court's docket.

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[4] Two similar cases involving Orthodox Jewish servicemen are presently in the courts. *Bitterman* v. *Secretary of Defense*, D.D.C. No. 83-1177, *appeal pending*, D.C. Cir. No. 82-01455; *Kirshenbaum* v. *Secretary of Defense*, D.D.C. No. 84-5268, *appeal pending*, D.C. Cir. No. 84-01302.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 1985

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[5] The National Jewish Commission on Law and Public Affairs ("COLPA") frequently appears *amicus curiae* in this Court on behalf of the organized Orthodox Jewish community in cases involving the rights of religious minorities. In this case, it has assisted petitioner's counsel in the lower courts, and has been authorized to advise the Court that the position stated herein is supported by the following national Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1723

S. SIMCHA GOLDMAN, PLAINTIFF-APPELLEE,

v.

SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. ~~82-1455~~ 81-01522)

Argued March 22, 1983

Decided May 8, 1984

Alfred R. Mollin, Attorney, Department of Justice, with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney (at the time the brief was filed), and *Anthony J. Steinmeyer*, Attorney, Department of Justice, were on the brief, for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Nathan Lewin with whom *David J. Butler* and *Robert A. Smith*, were on the brief, for appellee.

Before: MIKVA and EDWARDS, *Circuit Judges*, and SWYGERT, **Senior Circuit Judge* for the United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by Senior Circuit Judge SWYGERT.

SWYGERT, Senior Circuit Judge. This is an appeal by the Secretary of Defense and the Secretary of the Air Force from the district court's order enjoining the enforcement of an Air Force dress code regulation that had been invoked to prohibit the plaintiff, an Orthodox Jewish captain, from wearing a yarmulke for religious reasons while in military uniform. Because we believe the Air Force raised sufficient reason for prohibiting deviations from its uniformly applied uniform requirements, we reverse.

I

S. Simcha Goldman, an ordained rabbi, is an Orthodox Jew who, in accordance with his Orthodox Jewish upbringing, has since childhood observed certain Jewish traditions and laws including keeping his head covered at all times. Between 1970 and 1972 he served as a chaplain in the United States Navy, where he wore a yarmulke as a head covering while in uniform without incident. In 1973 he was admitted into the Armed Forces Health Professions Scholarship Program, which provided assistance for graduate study in exchange for a later commitment to serve on active duty in the armed services. See 10 U.S.C. §§ 2120-2127 (1982). After completing a Ph.D. in clinical psychology in 1977 Goldman entered active service as a captain and was assigned

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

to the Mental Health Clinic of the Air Force Regional Hospital at March Air Force Base, in Riverside, California. Between September 1, 1977, and May 8, 1981, he wore a yarmulke at all times while on duty at March. Neither before his joining the Air Force nor during his first three and one-half years in the service was he informed that wearing a head covering in addition to his uniform was problematic, although he did explain its religious significance to several co-workers and patients who inquired. Throughout his service he received consistently outstanding evaluations in each of ten specified areas from his superiors, including the category "Professional qualities (Attitude, dress, cooperation, bearing)." JA 258-67.

On May 8, 1981, Goldman was summoned by Colonel Joseph Gregory, then the Hospital Commander at March, and was told that wearing a yarmulke while in uniform violated Air Force Regulation ("AFR") 35-10. AFR 35-10 is a meticulously detailed compendium of rules governing the proper wear and combination of uniform items, classified by rank, sex, job function, season, climate, weather, occasion, country or location within a country, and other such classifications. AFR 35-10 § 1-6 generally requires that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty," and AFR 35-10 § 1-6(h)(2)(f) requires that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security personnel in the performance of their duties." Colonel Gregory informed Goldman that wearing a yarmulke in addition to the Air Force uniform, or wearing even a uniform hat indoors, would violate these regulations, and orally ordered him to cease wearing the yarmulke indoors at all places on the base except the hospital, noting that disobedience could subject him to a court-martial. Goldman's request that he be allowed to keep his head covered as required by his

religious beliefs was denied. After the meeting Goldman sought legal and religious counsel, and continued to wear a yarmulke. On June 23, 1981, after negotiations by his counsel proved unsuccessful, he was summoned for another meeting with Colonel Gregory, and received a written order to cease wearing the yarmulke anywhere on the base. His request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a Letter of Reprimand, and sought and received two days' emergency leave when formal processing of the reprimand began. Colonel Gregory also withdrew a recommendation that Goldman's application to extend the term of his active service be approved, and substituted a negative recommendation.

On July 2, 1981, Goldman filed this suit, challenging the regulation on first amendment grounds. The district court granted a temporary restraining order and a preliminary injunction against enforcement of AFR 35-10 pending a full hearing. At the hearing the Air Force argued that strict observance of its regulations, which are detailed and exacting as to the occasions and manner for wearing "headgear,"[1] was necessary to preserve

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[1] AFR 35-10 § 1-6(h) prescribes the following general rules:

> Wear of Headgear:
>
> (1) Air Force personnel in uniform will wear proper headgear when outdoors (including while operating bicycles, mopeds, or similar vehicles, unless safety headgear is worn). Designation of uniform combinations and accessories to be worn during special occasions is a function of local commanders. However, there are times when wear of the service cap for men and beret for women is most proper. For example, members should wear this headgear when greeting and escorting US and foreign dignitaries such as heads of state, ambassadors, attaches, and legislative members. Commanders have the authority

morale (lest other members not excused from observing the largely arbitrary rules be resentful) and to instill a reflexive sense of obedience essential for military order,

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to specify other occasions when wear of the service cap (men) and beret (women) is proper.

(2) Headgear will not be worn:

(a) When ordered to uncover.

(b) When wearing required safety gear.

(c) When prohibited by major commanders on their flightlines.

(d) During religious services not associated with a military ceremony (the chaplain conducting a military religious ceremony will give guidance for wearing headgear).

(e) By women in dress uniforms. EXCEPTION: Women will wear the service hat or beret with the semiformal uniform or if outergarments are worn over the informal uniform.

(f) While indoors except by armed security police in the performance of their duties.

(3) The wear of headgear is optional:

(a) While operating or riding in military or privately owned vehicles.

(b) When wearing utility or organizational uniforms in the work area, as directed by the installation commander. A listing of designated areas must be incorporated into local supplements to this directive.

(4) Appropriate safety headgear is required for motorized two-wheeled vehicles and encouraged for bicycles (paragraph 1-16).

Id. § 2-5(j) specifies the manner in which certain hats are to be worn as follows:

> [The] service hat is worn squarely on the head. [The] flight cap is worn slightly to the right, with vertical crease of cap at center of forehead in a straight line with nose and at point between 1½ inches above the eyebrows. The crown is not crushed.

Special uniform hats for security police are prescribed in *id.* § 4-3(c)(1):

pride, teamwork, and image. The district court, however, discounted these arguments because the Air Force presented no objective studies to verify the assertion that

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Beret. All security police personnel at group level or below, including instructors at the USAF Security Police Academy, Lackland AFB TX, wear the blue beret, AF Shade 1561, in the following manner:

(a) Headband (edge binding) will be positioned straight across the forehead, 1 inch above the eyebrows. The top of the beret will be draped over the right ear and the stiffener, the command emblem or officer grade insignia, is aligned above the left eye.

(b) Officers wear their metal grade insignia (regular size). They may remove the insignia when it is desirable to subdue the appearance of the wearer. (For example, personnel on deployment or in a local ground defense environment.)

(c) Airmen wear the metallic command emblem affixed to the stiffener on the beret parallel to the edge binding. The bottom of the emblem will be positioned ½ inch from the top of the edge binding. They may remove the command emblem when it is desirable to subdue the appearance of the wearer. (For example, personnel on deployment or in a local ground defense environment.)

(d) The ribbon at the back of the beret will be adjusted for comfort and tied in a knot. Ribbon ends will be cut off at the knot.

Male food service personnel's hats are regulated by *id.* § 4-14(a):

(6) Chef Cap. White, high crown, French Chef style, as authorized in TA 016 or a plain white paper, expendable, high crown, adjustable head size, French Chef style, may be locally purchased for wear. Shift leaders on duty will wear the chef cap; however, they will not wear it outside the duty area.

(7) Food Handler's Cap. White, adjustable head size, expendable as authorized in TA 016. Personnel below the position of shift leader will wear this cap while en-

exceptions for religious reasons would erode morale and obedience. It also credited the evidence presented by Goldman's expert, a military psychologist, who testified

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gaged in food preparation; however, they will not wear it outside the duty area.

. . . .

(10) Headgear:

(a) Flight cap is worn with the basic uniform. This cap may not be worn when the field jacket is worn.

(b) Utility cap is worn with the basic uniform. This cap may not be worn when either the raincoat, all-weather coat or lightweight blue jacket is worn.

(c) Organizational baseball cap, when authorized by installation commander, is worn with the basic uniform. This cap may not be worn when either the raincoat, all-weather coat, or lightweight blue jacket is worn.

Hats to be worn with "functional clothing" are regulated by *id.* § 4-13:

a. As directed by the installation commander, the wearing of headgear is optional in the work area. A listing of designated areas must be incorporated into local supplements to this regulation. Required safety headgear must be worn. When away from the work area, members must wear appropriate military headgear.

b. Airmen do not wear chevrons on their caps.

c. No metallic devices are worn on functional clothing except:

(1) Officers will wear grade insignia on their caps.

(2) Metal grade insignia may be worn on white uniforms (for example, food service, medical, and dental uniforms).

Hats to be worn by other specialized members of the Air Force are regulated by *id.* § 4-11:

a. Members assigned to special operations (commando) units may wear the campaign (bush) hat with the utility uniform.

[Continued]

that making exceptions to the regulations for worthwhile reasons actually improved morale by dissipating hostility over minor disputes and conveying a sense of humaneness, as the military had found when it excused black members who suffered from pseudofolliculitis barbae (ingrown facial hair) from shaving; and credited Goldman's evidence that his yarmulke was unobtrusive and did not interfere with his work as a clinical psychologist. The district court therefore permanently enjoined the Air Force from prohibiting Goldman to wear a yarmulke while in uniform and from punishing him for refusing to remove it. This appeal followed.

II

The first dispute we must address concerns the proper level of scrutiny with which we must examine the alleg-

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[1] [Continued]

b. Basic training instructors within Air Training Command (ATC) may wear a blue campaign hat with utility and service uniform combinations.

c. Pararescue members may wear the maroon beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

d. Combat control team members may wear the scarlet beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

e. Air Weather Service parachutists may wear the light navy beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

f. Tactical Air Control personnel may wear the black beret with camouflage fatigues.

g. Military training instructors assigned to the Defense Language Institute English Language Center (DLIELC) may wear the distinctive maroon campaign hat.

AFR 35-10 contains numerous other rules concerning types of hats and manner of wear *passim*.

edly unconstitutional regulation. Goldman argues that the regulation must be scrutinized strictly and may be upheld only if it is narrowly drawn and justified by a compelling interest, because it affects a fundamental right guaranteed by the free exercise of religion clause of the first amendment. See *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 215, 221 (1972);[2] *Sherbert v. Verner*, 374 U.S. 398, 403, 406-07 (1963);[3] see also *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).[4] The Air Force argues that it should be upheld if it is rational, because military judgments are entitled to special deference. See *Chappell v. Wallace*, 103 S.Ct. 2362, 2365-66 (1983); *Brown v. Glines*, 444 U.S. 348, 354, 356-57 (1980); *Parker v. Levy*, 417 U.S. 733, 758 (1974);[5] *Orloff v.*

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[2] The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

406 U.S. at 215.

[3] We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516, 530.

374 U.S. at 406.

[4] It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

[5] While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those

Willoughby, 345 U.S. 83, 94 (1953).[6] The Supreme Court discussed a similar dispute concerning the appropriate level of scrutiny of a sex-based classification in the military context in *Rostker v. Goldberg*, 453 U.S. 57 (1981). It rejected suggestions that consideration of the weighty interests on each side be used to refine the test under which the classification should be judged (an approach followed by some courts in analogous areas, see, e.g., *Madyun v. Franzen*, 704 F.2d 954, 959-60 (7th Cir.) (judging prisoners' free exercise claims under an intermediate standard), *cert. denied*, 104 S.Ct. 493 (1983)), holding instead that

> [a]nnounced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

453 U.S. at 69-70. Under this approach we must simply judge whether the restrictions on Goldman's right to ex-

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protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be impermissible outside it.

[6] The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

ercise his religion were authorized and justified by the power of the military to regulate itself, giving due weight to each of the conflicting interests. See also *United States v. Robel*, 389 U.S. 258, 267 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. . . . It is not our function to examine the validity of [a] congressional judgment [that one alternative to the statute in question would be inadequate]. . . . We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake."). This inquiry does not require a "balancing" of the individual and military interests on each side, but rather a determination whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree.[7]

The standard of review articulated in *Rostker* is designed for evaluating asserted clashes between individual

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[7] See *United States v. Robel*, 389 U.S. at 268 n.20:

> We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

rights and governmental powers, each specifically provided for by the Constitution. Thus far we have assumed that such rights and powers are involved in this case, but in fact each of the parties here argues that the other's interest is illusory. These preliminary arguments must be evaluated before we turn to the merits of the plaintiff's claim. First, the Air Force contends that Jewish law does not require the covering of the head during work, citing G. Appel, The Concise Code of Jewish Law 34 n.3 (1977), I. Klein, A Guide to Jewish Religious Practice 51-52 (1979), and Goldman's own admission that some Orthodox Jews who consider themselves devout do not feel obliged to cover their heads at all times. It concludes that no free exercise interest is at stake. There is no question, however, that Goldman's religious convictions are sincere, even if not shared by all who profess his faith. The Supreme Court has decisively held that definitive articulation of religious dogma or practice is beyond the competence of secular judicial bodies, and that practices based on religious conviction, even if not universally followed, are protected by the free exercise clause. *Thomas v. Review Board*, 450 U.S. at 715-16.[8] It is indisputable that covering his head is a protected part of Goldman's exercise of his religion.

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[8] Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Conversely, Goldman argues that the Air Force's interest in uniformity is only marginally related in this case to its military mission, because it was acknowledged that Goldman's wearing a yarmulke had no effect on the performance of his duties or on the general esprit de corps at the base. He concludes that because the application of the regulation to him served no military purpose, it was, in effect, not an exercise of the military powers provided for by the Constitution, and deserved little deference. Although we discuss the premise of this argument, that the regulation serves no weighty purpose as applied to Goldman, in greater detail below, it is sufficient to note here that the efficacy or inefficacy of measures allegedly designed to serve a military purpose and taken by those to whom judgment on military affairs is entrusted does not alter their status as military matters, entitled to whatever degree of deference that status entails. Contrast *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (extending no special deference to statutes providing benefits to members of the uniformed services that never purported to be a congressional judgment on a uniquely military matter). For these preliminary purposes, the content of the military decisions is of far less importance than their constitutional source.

The source of the power exercised by the Air Force in issuing its regulation is problematic, however, but for a different reason. *Rostker* emphasized that great deference is due to *Congress*'s decisions concerning the military, because "Congress is a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States," 453 U.S. at 64, because the scope of power specifically entrusted by the Constitution to Congress in military matters is broad, *id.* at 64-65, and because of the lack of judicial competence in this area, *id.* at 65-66. See also *Chappell v. Wallace*, 103 S.Ct. at 2366; *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *Gilligan v. Morgan*, 413 U.S.

1, 10 (1973). But cf. *Crawford v. Cushman*, 531 F.2d 1114, 1121 (2d Cir. 1976) (finding "no basis for a judicial deference to the military here which precludes review of appellant's substantive constitutional claims" that a Marine Corps regulation requiring the discharge of women Marines for pregnancy violated equal protection and due process). As the district court noted, however, JA 17, the actions challenged in this case are not those of Congress, but those of the military, which cannot so readily be assumed to have weighed the competing claims of individual rights and military necessity. See *United States v. Robel*, 389 U.S. at 276-77 (Brennan, J., concurring in result); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting). We might therefore be less ready to indulge a presumption that the Air Force regulations accommodate individual rights in a constitutionally acceptable manner, because some of the reasons for such deference are lacking. Nevertheless, the Court has held that decisions made by the military under a delegation from Congress are entitled to deference, because of the specialized nature of judgments concerning internal military governance. See *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 890-94 (1961). Even though the specific authorization for Air Force dress code regulations, Exec. Order No. 11,390 § 1(7) (Jan. 24, 1968), 33 Fed. Reg. 841 (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 4682, 4683, was purportedly promulgated pursuant to a specific delegation from Congress that had just been repealed, 10 U.S.C. § 8611 (1964), *repealed by* Act of Jan. 2, 1968, Pub. L. No. 90-235, § 8(2), 81 Stat. 753, 764, AFR 35-10 is nevertheless entitled to all the deference due to exercises of validly delegated power, because the Secretary of the Air Force is generally authorized by 10 U.S.C. § 8012(f) (1982) to prescribe regulations necessary to carry out his duties. *Cf. Brown v. Glines*, 444 U.S. at 353-58 (upholding different Air Force regulations). We

conclude that this case does involve a clash between constitutionally guaranteed individual rights and constitutionally authorized military power, of the kind addressed in *Rostker v. Goldberg*, and we therefore turn to an examination of the parties' substantive arguments.

The Air Force contends that precise adherence to its uniform requirements is necessary to maintain teamwork, motivation, discipline, esprit de corps, and image, and that making exceptions for any reason would undermine these goals. Goldman argues first that these assertions are based only on past military practice and have not been tested or validated, and second that in any case it is evident that making an exception for him would have no deleterious effect, as shown by the outstanding performance record he compiled during the three and one-half years when his practice of wearing a yarmulke went unchallenged. We discuss the arguments concerning the general validity of the uniform requirements and the feasibility of making exceptions to the regulation in turn.

Because in *Rostker* the Supreme Court considered in detail the extensive congressional hearings and reports concerning probable military needs before upholding Congress's decision to exclude women from draft registration, 453 U.S. at 72-83, Goldman argues that similar verification of the assumptions underlying the Air Force's decision to enforce its dress code regulations against him is necessary before we may uphold that decision. In reaching its conclusion that exceptionless uniformity is beneficial, the Air Force relies on its own experience and on reports that laxity in enforcing such regulations had contributed to lapses in discipline in other branches of the armed services. See Report by the Special Subcommittee on Disciplinary Problems in the U.S. Navy of the House Committee on Armed Services, 92d Cong., 2d Sess. 17,682 (Comm. Serial No. 92-81, 1973); JA 60-66, 71-72; H. Semmes, Portrait of Patton 8

(1955) ("Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly more than anything else. If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men."). Its judgment was in the area of military governance, on which its expertise is high and on which judicial competence is low. *Rostker*, 353 U.S. at 70. Although we must not abdicate our responsibility to review the constitutional challenge, we cannot lightly substitute our judgment whether a closer accommodation of religious interests would be possible given the legitimate military interests in order and obedience. *Id.* at 70-71.

Our review of the more particularized arguments concerning the feasibility of making exceptions to the regulations does not persuade us that the Air Force's judgment must be set aside. One of its arguments, it is true, is unpersuasive. General Usher, who testified on behalf of the Air Force at trial, argued that one reason for scrupulous uniformity was safety, because, for example, an unauthorized hat worn on a flight line might fly into a jet engine and cause it to malfunction or explode. JA 63-64. We have no doubt that more narrowly drawn regulations, accommodating religious practices to a greater degree, would satisfy such safety concerns; there is no indication that safety within the Mental Health Clinic was threatened.

Goldman argues that his yarmulke, which was small, dark colored like his hair, and unobtrusive, posed as little danger to morale, appearance, and discipline as it did to safety. The Air Force responds that it is necessary to consider, not the effect of a single exception, but the cumulative effect of numerous exceptions that might be requested, in evaluating the disruptive effects of failure to enforce AFR 35-10. It cites *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 652-54 (1981), in which the Supreme Court upheld a state reg-

ulation of the time, place, and manner of solicitation on state fairgrounds because of the likely disruption if the plaintiffs and numerous others proselytized freely, and argues that if members of numerous other religions with distinctive garb flood the Air Force with requests for exemptions, similarly severe disruption would result. It offered a study of religious garb requirements, indicating that various sects require a wide variety of practices, including wearing turbans, robes, face and body paint, shorn hair, unshorn hair, badges, rings, amulets, bracelets, jodhpurs, and symbolic daggers, JA 274-84, to show that the danger of disruption was real. This argument assumes that substantial numbers of members of these sects have enlisted and would be likely to request exemptions, and that the Air Force could not distinguish practices that would not be obtrusive from those that would.

Goldman argues that no showing was made of the representation of these sects in the service, making it impossible to reach any conclusion about likely disruption. Although this argument has some force, the Air Force responds that the study was designed to survey the practices of religious adherents likely to be found in the armed services.

Goldman also argues that a less restrictive means of avoiding disruptive aberrations from the uniform requirements would be to bar only those practices that are actually obtrusive. If a yarmulke like Goldman's is in fact not obtrusive, as the district court found, even widespread adherence to the practice would not be chaotic, unlike *Heffron*, where widespread proselytizing would have posed very real crowd control problems. The Air Force responds that it cannot reasonably distinguish among various religious practices, but must either allow or disallow all requested exceptions. At first blush this response seems weak for two reasons. First, the Supreme Court has not hesitated in the past to assess whether ap-

plication of a state law to members of a religious group furthers the asserted state interest. In *Wisconsin v. Yoder*, 406 U.S. at 221-22, for example, it held that the state's legitimate interest in promoting self-reliance among its citizens was not furthered by applying its mandatory school attendance law to Amish children, who were adequately trained for a productive life within their own communities. Similarly, in *Thomas v. Review Board*, 450 U.S. at 718-19, the Court held that withholding unemployment benefits from a worker who resigned for religious reasons did not further the state's interest in preventing unemployment, because there was no evidence that it would be difficult to distinguish those who resign for personal reasons from those who resign for religious ones. See also *Sherbert v. Verner*, 374 U.S. at 407. Moreover, it appears that the Air Force already distinguishes among practices that may be religious, for the regulations permit certain deviations from complete visible uniformity, such as the wearing of rings and bracelets of nonuniform design, see AFR 35-10 § 1-12 (b) (1) (b), and have been interpreted to allow the wearing of nonuniform undergarments and ornaments, provided they are not visible beneath the required uniform, despite the existence of military-issue undergarments. The Air Force therefore does distinguish, for example, Mormons who wear "temple garments" underneath their outer clothing from Orthodox Jews, whose religious garb, though visible, is nearly as unobtrusive. If obtrusiveness is the underlying standard actually employed in making these distinctions, the Air Force arguably should be required to employ it in a more thoroughgoing manner, in order to accommodate rights of free exercise to the greatest possible extent. It then would be no answer to assert, as the Air Force does, that wearing rings and special undergarments are not exceptions to the uniform requirements, on the ground that the regulation specifically allows them, because the reason for the difference in treatment of various nonstandardized articles of cloth-

ing and ornaments, rather than the fact of the difference, would be at issue.

We are nevertheless persuaded that the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. Its regulations are necessarily arbitrary. It is impossible to argue, for example, that a decorative hat of one shape or one color is demonstrably superior to another, although it is possible to argue that enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience. Unlike the states in *Wisconsin v. Yoder*, *Thomas v. Review Board*, and *Sherbert v. Verner*, whose interests in enforcing their rules would not be greatly impaired by making exceptions when enforcement would not serve the purpose underlying the rules, the Air Force has no concrete interest separate from the effect of strict enforcement itself. The rules themselves are arbitrary, and are enforced up to an arbitrary cutoff point—the point of visibility. It is nearly inevitable that some religious practices will fall on one side of the line and some on the other. But the Air Force argues that it cannot make exceptions to the cutoff line for religious reasons without incurring resentment from those who are compelled to adhere to the rules strictly (and whose resentment would be intensified by the arbitrariness of the rules), thereby undermining the goals of teamwork, motivation, discipline, and the like; and that it cannot move the line, so as to avoid the problem of making exceptions, without losing the benefits of uniformity altogether. It therefore concludes that strict enforcement of its regulations is necessary for its military purposes. Although Goldman's expert testified that making exceptions would defuse rather than cause resentment, the Air Force's

judgment on this issue is entitled to deference because it is within its expertise and outside ours.

The free exercise clause of the first amendment guarantees both the freedom to believe and the freedom to act, but only the former is absolute; conduct is regulable for a permissible reason, provided that the regulation is not unduly restrictive. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Although Goldman raises serious questions concerning the restrictiveness of the Air Force's regulations and the manner of their enforcement, the Air Force's reason for its rules, particularly in view of their specialized military nature, are sufficient answer. The judgment below is therefore vacated and the case remanded. On remand the district court should determine whether, in light of the difficulty of the issue and the good faith of the parties, equity requires that Goldman's military record be expunged of any negative materials related to the issues in this case.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1723

S. SIMCHA GOLDMAN

v.

SECRETARY OF DEFENSE, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 81-01522)

On Appellee's Suggestion for
Rehearing *En Banc*

Filed: August 10, 1984

Nathan Lewin and *David J. Butler* were on the suggestion for rehearing *en banc* filed by appellee.

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

Appellee's suggestion for rehearing *en banc* has been transmitted to the full court and a majority of the judges in regular active service have not voted in favor of such rehearing. Accordingly, it is

ORDERED, by the Court, *en banc*, that appellee's suggestion for rehearing *en banc* is denied.

Per Curiam

Statement dissenting from denial of suggestion to hear case *en banc* filed by *Circuit Judge* STARR.

Statement dissenting from denial of suggestion to hear case *en banc* filed by *Circuit Judge* GINSBURG, in which *Circuit Judge* SCALIA concurs.

STARR, *Circuit Judge, dissenting from denial of suggestion to hear case en banc.*

I respectfully dissent from the court's declination to hear this case en banc.

The tension between individual liberty guaranteed by the Bill of Rights and the demands of our armed services in carrying out their vital mission is an area fraught with extreme difficulty. But with respect I am constrained to conclude that, notwithstanding the sensitivity of the setting, the panel decision in this case does considerable violence to the bulwark of freedom guaranteed by the Free Exercise Clause.

It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on military personnel regulations. In matters touching upon the exigencies of military affairs, the courts have wisely exercised the restraint and caution that befits the unelected branch of government. The wisdom of Justice Jackson in *Orloff v. Willoughby*, 345 U.S. 83 (1953), articulated in the shadow of the Korean Conflict, bears repeating today:

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.

Id. at 94. And this court has rightly been quick to decline invitations to engage in "judicial oversight of military policy decisions. . . ." *Blevins v. Orr*, 721 F.2d 1419, 1423 (D.C. Cir. 1983).

It is thus with circumspection that I have come to the view that the panel decision abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel. For notwithstanding the broad latitude rightly vested in those

charged with defending the Nation's security, I am unable to agree that the needs of the military warrant vitiating the very liberties which the armed services have valiantly defended in the two centuries of the Nation's history.

To briefly review the facts giving rise to this case, it is undisputed that Dr. Goldman has served his country with distinction for fourteen years. It is also undisputed that during this period of exemplary service, Dr. Goldman followed uneventfully the dictates of his conscience by wearing the traditional yarmulke, a symbol of his faith whose roots are as deep and venerable as Western civilization itself. It is further undisputed that Dr. Goldman's wearing of the yarmulke resulted in no displacement of the military uniform in any manner whatever. Dr. Goldman never objected to wearing the entire military uniform as prescribed in the regulations. He simply chose, by reason of conscience, to wear in addition this symbol of a great faith from which Western morality and the Judaeo-Christian tradition have arisen. This is the offense for which Dr. Goldman has been threatened with court-martial.

The military itself, at least until today, has assiduously and quite properly defended the right of the Nation's military personnel to engage in worship and other religious observances while on active duty and while on military bases. The military thus stands before the court with a long and admirable tradition of providing, at taxpayers' expense, chaplaincies and places of worship on military bases around the world. In the context of this tradition, it would be unthinkable for the military to promulgate a rule that forbade audible prayer while a serviceman is on active duty. Yet the military seeks to forbid an act that partakes of the religious significance of prayer and is equally unobtrusive. And, critically, the applicable military regulations permit the wearing of other unobtrusive religious regalia, such as undergar-

ments or rings and bracelets bearing religious significance. Dr. Goldman's only "error" is that he wears a yarmulke.

The treatment of Dr. Goldman seems to me patently unconscionable. While courts quite properly defer to military expertise, we cannot abdicate our core constitutional responsibilities simply because a case arises in a military setting. As Justice Jackson also stated:

> [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialties . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). Chief Justice Marshall made the point even more succinctly: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is no less true." 2 Burr's Trial at 444.

The panel opinion justifies this manifest infringement of First Amendment liberty by the military's need for uniform adherence to an *admittedly arbitrary* rule. In the military's view, accepted by the panel, providing exceptions to the rule would cause resentment in those servicemen for whose religious garb no exception can properly be made. The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content, is utterly belied, however, by Dr. Goldman's own experience in serving his country. Not a scintilla of evidence in the record suggests that his wearing of a yarmulke caused any resentment whatever in others. The claim is contradicted by expert testimony, credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more

justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets. The vice inherent in an arbitrary rule of this kind is that it does not offer to one who falls on the wrong side of the line any reason for the disparate treatment from which he or she suffers.

In interpreting the Free Exercise Clause, the Supreme Court has required those in authority to accommodate those who wish to exercise their religious liberties, unless the accommodation would prove unduly burdensome. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1971). Slavish devotion to arbitrary rules is precisely the opposite of the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires. Unless the military can offer firmer support for the counterintuitive proposition that accommodation of its dress code to deeply held religious beliefs breeds more resentment than simple arbitrariness, it should not be allowed to abrogate this long-standing interpretation of the Free Exercise Clause.

It is time to recall that the First Amendment means more than a strong and free press. It means more than protecting the right peaceably to assemble. It means more than preventing the National Government from establishing a state religion. It means the inalienable right of all our people as free men and women to worship God. That is what this country is all about. Dr. Goldman has been required to render to Caesar far too much for far too little reason.

GINSBURG, *Circuit Judge, dissenting from denial of suggestion to hear case en banc*, in which Judge Scalia concurs: The plaintiff in this case, S. Simcha Goldman, has long served his country as an Air Force officer with honor and devotion. A military commander has now declared intolerable the yarmulke Dr. Goldman has worn without incident throughout his several years of military service. At the least, the declaration suggests "callous indifference" to Dr. Goldman's religious faith, and it runs counter to "the best of our traditions" to "accommodate[] the public service to the[] spiritual needs [of our people]." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *cf. Braunfeld v. Braun*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting) (commenting on state law exposing Orthodox Jew to "cruel choice" between "his religious faith and his economic survival"). For the reasons indicated in Judge Starr's eloquent statement, I believe the court en banc should measure the command suddenly and lately championed by the military against the restraint imposed even on an armed forces commander by the Free Exercise Clause of the First Amendment.

APPENDIX C

[FILED APR 26 1982, JAMES F. DAVEY, Clerk]

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action 81-3197

S. SIMCHA GOLDMAN,

Plaintiff

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1.) Plaintiff S. Simcha Goldman ("Goldman") is a member of the Orthodox Jewish faith, an ordained Rabbi, and until August 30, 1981, a Captain in the United States Air Force serving at March Air Force Base, Riverside, California. Prior to his Air Force service he had been a chaplain in the Navy.

2.) Defendants are the Secretary of Defense and the Secretary of the Air Force. This action is brought against them in their official capacities.

3.) Since his assignment to the Mental Health Clinic at March Air Force Base Regional Hospital in September 1977, including while he was in military uniform, and pursuant to tradition and practice of his Orthodox Jewish faith, Goldman has worn a small head covering ("yarmulke"). Goldman has continuously worn his yarmulke since he was a child.

4.) From September 1977 to May 7, 1981, no objection was raised to Goldman's wearing of his yarmulke while in uniform. On May 8, 1981, Colonel Joseph Gregory, the Hospital Commander at March Air Force Base, informed

Goldman that the wearing of a yarmulke while in military uniform violated Air Force Dress Code Regulations ("AFR") 35-10.[1] Colonel Gregory ordered Goldman to cease wearing a yarmulke indoors while in uniform at all places at March Air Force Base except while working at the Regional Hospital.

5.) Goldman informed Colonel Gregory that the wearing of the yarmulke was required by his Orthodox Jewish religious beliefs and practices and was a religious observance he believed protected by the First Amendment to the United States Constitution. Goldman requested permission to continue wearing a yarmulke at all times and at all places while in uniform, despite the provisions of AFR 35-10. His request was denied.

6.) On June 23, 1981, Goldman was ordered by Colonel Gregory to cease wearing his yarmulke anywhere while in uniform at March Air Force Base, including the Regional Hospital. Goldman's request to appear for duty in civilian clothes until the dispute was resolved was denied.

7.) On June 24, 1981, Colonel Gregory issued a letter of reprimand to Goldman because he refused to remove his yarmulke in violation of the June 23 order of Gregory. Goldman was notified on June 30 of the formal processing of the letter of reprimand. He immediately requested and was granted two (2) days of emergency leave.

8.) On July 2, 1981, Goldman filed this action. His application for a Temporary Restraining Order was granted. On July 10, 1981, this Court issued a preliminary injunction enjoining defendants from enforcing AFR 35-10 to prohibit Goldman from wearing a yarmulke while in uniform during the pendency of this action.

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[1] AFR 35-10 provides:

> "... Air Force members will wear the Air Force Uniform while performing their military duties ... members will wear only the uniform items as prescribed by this regulation ... the wearing of combinations of uniform items not specifically prescribed in this regulation is prohibited ..."

It was promulgated pursuant to Executive Order 11390 § 1(7) (1968) and 10 U.S.C. § 8611, now repealed. Enforcement of the regulation is an exercise of the duties of the Secretary of the Air Force, as delegated by Congress in 10 U.S.C. § 8012 (1976).

9.) Trial was held on September 10, 1981. Major General William P. Usher, United States Air Force, Director of Personnel Plans at Air Force Headquarters, testified for Defendants as an expert on the bases underlying and the need for the uniform requirements of AFR 35-10. General Usher described the mission of the Air Force as being an instrument of National Security with a responsibility in conjunction with other military services, for defending this country against its enemies. He enumerated five major prerequisites for an effective and efficient fighting force: 1) teamwork; 2) motivation; 3) discipline; 4) esprit de corps; and 5) image. His testimony may be summarized as follows:

> Teamwork is the cutting edge of a combat ready fighting force; it is the welding of a well-oiled machine of people. A high degree of teamwork must be practiced to provide a combat ready fighting force. Uniformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission.
>
> Motivation provides the energy, the willingness to do what is "above and beyond," that often is the key to success in combat.
>
> Discipline helps insure that teamwork does not breakdown and assures a truly obedient response from the team. It is essential to prevent combat ineffectiveness and to minimize endangering lives. Uniform dress and appearance requirements are critical to maintaining the discipline necessary for an effective fighting force. Discipline of enlisted personnel would be undermined if a departure is permitted by an officer.
>
> Esprit de corps makes for a more effective fighting unit and comes when members of the unit are proud of their organization and are willing to subordinate their personal interests to the mission of the Air Force. Uniform standards of dress engender pride and thus further the mission of the Air Force. Departures from the uniformity requirements tend to

counteract pride and motivation and detract from the single image necessary for esprit de corps.

Image plays an important role in recruiting top flight people, in retaining experienced personnel, in sustaining the Air Force as an effective fighting force and in gaining public support.

10.) It is the official position of the United States Air Force that the requirements of AFR 35-10 pertaining to the wearing of the Air Force uniform are part of the method for providing teamwork, motivation, discipline, esprit de corps and image in the United States Air Force. Departure from the uniformity standards of AFR 35-10, in the opinion of the Air Force, would adversely affect the promotion of teamwork, counteract pride and motivation, undermine discipline and morale.

This position was not established by clinical or other studies of the effect on a combat-ready fighting force unit of exceptions from the uniformity requirements of AFR 35-10. It is based upon the experience of the Air Force in times of peace and in times of war.

11.) AFR 35-10 includes a religious exception that permits the chaplain in charge of a particular religious service to specify particular headgear to be worn by members who are participating in that service. There are no other religious exceptions to the regulations except that Air Force chaplains on inactive reserve status may wear beards for religious reasons.

12.) Exceptions for legitimate reasons from the requirements of AFR 35-10 may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution. Occasional exceptions to the requirements of AFR 35-10 for specific legitimate purposes will not adversely affect the ability of the Air Force to carry out its mission.

13.) In enforcing AFR 35-10, the Air Force does not distinguish between personnel deviating from uniform dress for religious reasons and those deviating from uniform dress for other reasons such as personal taste or preference. All, like Goldman, are subject to court-martial or other sanctions for violations of the uniform dress requirements of AFR 35-10.

14.) During his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel. Goldman's performance evaluations were consistently at the higher levels. His application for the renewal of his Air Force contract was endorsed with a commendation for his work in the Mental Health Clinic.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

2. Venue in this district is proper under 28 U.S.C. § 1391(b).

3. The wearing of a yarmulke by a Jewish male is a practice which falls within the ambit of the free exercise clause of the First Amendment to the United States Constitution. *See Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

4. It is well established that "[w]hile members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy,* 417 U.S. 733, 758. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.*

5. When regulation of the military is faced with a constitutional challenge, "the courts are called upon to decide whether Congress [or its delegate], acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred." *Rostker v. Goldberg,* 101 S. Ct. 2646, 2654 (1981). In determining whether an explicit guarantee of individual rights has been transgressed, attention must be focused on whether or not the decision occasioning the constitutional challenge was the result of a studied and supported

analysis or one based on instinct, assumptions and individual experience; "deference does not mean abdication." *Id.*

6. The decision to exclude a *bona fide* religious exception for the wearing of yarmulkes from AFR 35-10 was not the result of a studied and supported analysis. The only evidence adduced at trial through General Usher was that tradition and personal experience has taught that discipline, esprit de corps, motivation, teamwork and image would be injured by allowing a religious exception for the wearing of yarmulkes.

7. By contrast, in *Rostker,* the Court was persuaded that the decision to exclude women from the draft did not violate the constitution upon examination of the careful consideration Congress gave to the question of an all male draft. Justice Rehnquist wrote that "[t]he District Court was quite wrong in undertaking an independent evaluation of this evidence [studied by Congress], rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence." In short, deference can only be given to the decision maker regulating the military when its decision was a reasoned and deliberate one. Had the decision to exclude a *bona fide* religious exception for yarmulkes from AFR 35-10 been the product of an empirical study, psychological survey or the like, it would be supportable. While respect must be given General Usher's expertise, his conclusions, based as they are on the personal beliefs and assumptions of Air Force officials, are inadequate to withstand constitutional scrutiny.

8. Members of the Jewish faith have no special claim to first amendment protection on account of their religion and its dictates. *See Heffron v. Int'l Soc'y for Krishna Consciousness,* 101 S. Ct. 2559 (1981). Once an exception is made for male members of the Jewish faith to wear yarmulkes, members of other faiths who wish to wear skull caps must be permitted to do so.

9. Under the *Rostker* analysis, there was no evidence presented at trial sufficient to conclude that the military prohibition of yarmulkes in the interest of discipline overrides individuals' interests in exercising their freedom of religion.

10. Colonel Gregory's order of June 23, 1981, and the absence of a *bona fide* religious exception from AFR 35-10 for the wearing of yarmulkes while in uniform violated Plaintiff's First Amendment guarantee to the free exercise of religion.

An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

Aubrey E. Robinson, Jr.
United States District Judge

DATE: April , 1982

[FILED APR 26 1982, JAMES F. DAVEY, Clerk]

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants.

ORDER

Upon consideration of the Findings of Fact and Conclusions of Law entered this date, and of the entire record herein, it is by the Court this 26th day of April, 1982,

DECLARED, that the order issued to Plaintiff to cease wearing his yarmulke while in uniform, and its enforcement, violated the First Amendment to the United States Constitution; and it is

ORDERED, that defendants, their agents, subordinates or anyone acting in concert with them be and hereby are ENJOINED from applying AFR 35-10 to Plaintiff insofar as it relates to his wearing a yarmulke for religious reasons; and it is

FURTHER ORDERED, that defendants, their agents, subordinates or anyone acting in concert with them shall expunge from Plaintiff's military records all references to disciplinary action, sanctions or penalties (including negative recommendations concerning Plaintiff's continued military service) resulting directly or indirectly from Plaintiff's insistence upon wearing a yarmulke, despite the provisions of AFR 35-10; and it is

FURTHER ORDERED, that Defendants shall pay Plaintiff money damages equivalent to two days' pay for someone of Plaintiff's rank on June, 1981, to compensate Plaintiff for the two days emergency leave taken to avoid the imposition of immediate sanctions before this action was filed.

Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX D

Supreme Court of the United States

No. A-339

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 10, 1984

/s/ WARREN E. BURGER

Chief Justice of the United States.

Dated this 1st day of November, 1984

APPENDIX E

Supreme Court of the United States

No. A-339

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPER W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including January 7, 1985.

/s/ WARREN E. BURGER

Chief Justice of the United States

Dated this 3rd day of December, 1984.